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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 290...

JOSEPH B. BRENNAN,
Petitioner,

v.

HAWLEY PRODUCTS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 7, 1950, petition for rehearing therein having been denied on July 11, 1950.

OPINIONS BELOW.

The opinion of the District Court (R. 220-222) is unreported. The opinion of the United States Court of Appeals (R. 363-370) is officially reported in 182 F. 2d 945, and unofficially reported in 86 U. S. P. Q. 127.

JURISDICTION.

The judgment of the United States Court of Appeals in the above entitled case was entered on June 7, 1950 (R. 370); and petition for rehearing therein was denied on July 11, 1950 (R. 371). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

STATEMENT OF THE CASE.

This is an infringement suit brought by petitioner, an individual inventor and patentee of certain radio loudspeaker devices. Apart from a wholly-unsuccessful interference proceeding brought by R. C. A. many years ago against one of these patents, their validity has never heretofore been attacked; and respondent's infringements have continuously been protested. Petitioner has been denied an accounting and injunctive relief solely on the ground of laches. In reaching this conclusion, the Court of Appeals for the Seventh Circuit decided that laches dated from a time of constructive, not actual, knowledge of infringement, held that respondent's plant expansion had resulted in a prejudicial change of position, even though financed out of infringement-tainted profits, and refused to recognize the pressure of vital war-work as an excuse for delay. Upon all three of these points of law the decision of the Seventh Circuit Court of Appeals appears to be at variance with the conclusions reached in other Circuits. With a further observation that the death of two of respondent's witnesses had led to possible loss or obscuration of evidence we respectfully disagree, but do not press the point here since, unlike the other holdings, that conclusion turns solely upon the narrow facts of this case.

QUESTIONS PRESENTED.

1. Whether the defense of laches is available where the patentee had no actual knowledge of the infringement.

2. Whether, in an infringement suit, an infringer's plant expansion financed wholly out of infringement profits supports an equitable defense of prejudicial change of position.

3. Whether an infringer may invoke the defense of laches where, despite repeated notices of the patentee's claim, he neglected to pursue his remedy under the Federal Declaratory Judgment Act.

4. Whether the defense of laches is available to an infringer where the patentee repeatedly asserted his patent rights, sought compromise, and delayed suit only because of the pressure of vital war-work.

5. Whether a patentee is entitled as of right to injunctive relief against future wrongs, in the absence of facts constituting equitable estoppel.

STATUTE INVOLVED.

There are no pertinent statutory provisions involved here.

FACTS OF THE CASE.

Petitioner, as inventor (R. 173; 182; 314), has owned patent rights relating to manufacture of radio loud-speaker devices,—namely, the "spider patent" No. 2090025 issued on August 17. 1937, the "diaphragm patent" No. 1923965 issued on August 22, 1933 and the "method patent" No. 1923966 of same date.* (R. 261; Findings 3, 4 and 6.) After World War II hostilities had ceased, petitioner's trustee gave written notice of infringement respecting the spider patent on June 26, 1946. (R. 245; 262; Finding 15). Long prior thereto, petitioner had originally charged infringement of the diaphragm patent in conversation with respondent's former President during 1934. (R. 262; Finding 11.) Following further oral charges of infringement in 1937, respondent's attorney by letter then denied any violation of both the diaphragm and method patents. (R. 227; 262; Finding 13.) On April 6, 1939, petitioner's attorney sent formal written notice of infringement of the diaphragm and method patents to respondent. (R. 232-233; 262; Finding 14.) The second written notice of in-

* For convenience in presentation, the 1937 patent is referred to simply as the spider patent; and the two others are termed respectively the diaphragm and method patents.

fringement as to these two patents was subsequently given on September 27, 1946. (R. 246-247; 262; Finding 16.) Petitioner brought suit *pro se* on June 6, 1947 charging infringement of the diaphragm patent, with a supplemental complaint as to infringements of the method and spider patents being filed some ten months later. (R. 261; Findings 3 and 4.) The spider patent will expire in 1954, the others now having lapsed.

The first actual knowledge by petitioner as to the infringement of the spider patent was acquired in 1946, there having been no discussion of that matter with respondent's representatives before that time. (R. 87-88; 129-130.) No evidence was offered as to when respondent commenced manufacture of spiders in general, nor as to when it began making spiders claimed to constitute an infringement of petitioner's patent. Constructive notice was based upon the fact of petitioner's having patented the spider, diaphragm and method inventions. (R. 366-367.)

In 1933, petitioner became engaged in an interference proceeding brought by R. C. A. as to the diaphragm patent, which proceeding terminated with award of the decision completely in his favor about two years later. (R. 179; 183; 205.) Between 1934 and 1937, petitioner met respondent's former President frequently and on those occasions reiterated the charge as to infringement of the diaphragm patent. (R. 183.) In 1939, petitioner retained counsel to negotiate a non-exclusive license agreement with respondent. (R. 262; Finding 17; 230; 167-169.) Petitioner's attorney recommended at the time that the prestige of this patent be built up by way of non-exclusive licenses and increased manufacture of diaphragms, so as to meet any argument that it was a mere "paper patent." (R. 168; 178.) In addition to a then-outstanding license with respect to the first two patents (R. 314; Finding 7), petitioner subsequently negotiated new license agreements with

two other companies as to all three of the patents in suit. (R. 89; 90; 130; 178; 181; 182.) During that entire period from 1934 until 1947, petitioner or his counsel held numerous and repeated conferences with respondent's representatives, in the course of which there was continuous defense of diaphragm and method patent rights and insistence upon respondent's infringement. (R. 184-186; R. 168-170; 176; 247.)

In May of 1939, petitioner was plant manager of Romec Pump Company, then engaged in the production of aircraft pumps. A year and a half later he became an executive of Bender Body Company (his duties having to do with parts for the B-26 plane produced by The Glenn L. Martin Company), and in such work supervised production of bomb bays, doors, wing tips and fuselage sections. (R. 173.) In late 1941 or early 1942, petitioner organized and accepted employment with Fibre Form Company, retaining his position there until serious illness during 1946 (R. 261; Finding 8): Fibre Form was engaged in war-work continuously from 1942 to the end of the war, developing and producing critical engine parts. (R. 173; 180; 181.) He was likewise consulted during the war period by other companies as to management-engineering problems. Thus the war effort of this inventor embraced such diverse responsibilities as development of the aircraft fuel pump,—production of the bilge pump used by Army and Navy for transfer of fuels and oils,—bonding of silver bearings for the B-29 engine,—improvement of precision machine tools, special grinding machines and optical instruments,—and manufacture of close and critical Pratt & Whitney special parts. The record indicates that practically all of petitioner's time during the years of hostilities was devoted to supply of vital munitions, and to that alone. (R. 174; 175.)

Nine months after V-J Day, petitioner suffered a serious heart attack which confined him to his bed for the

remainder of 1946. Sometime prior thereto and continuing on during petitioner's illness, title to patents here involved had been placed in the hands of a trustee who handled petitioner's affairs throughout that period. (R. 261; Finding 10.) Within the crowded years in controversy, petitioner had intermittent contacts with attorneys looking to eventual representation in future litigation over these patents (R. 263; Findings 23 and 24); but the fragmentary correspondence interspersed among his war-time activities reached no understanding as to initiation of suit. (R. 179; 190.) While testimony as to possible compromise negotiations between petitioner and respondent's representatives was excluded at the trial,* the record shows respondent was never misled regarding petitioner's insistence upon patent rights and his determination to seek redress failing amicable adjustment of the infringements claimed. (R. 176; 156; 232-233; 228-229; 242; 165.) No contention of equitable estoppel founded upon deceit has been advanced.

In connection with the defense of laches, evidence was offered at the trial that respondent had (since 1934) expanded its business in manufacture of diaphragms and spiders so that floor space so devoted was presently two and one-half times the area originally involved,—and that

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* R. 170:

"*The Court*: I don't understand that offers of compromise are ever admissible against a person.

Mr. Oldham: We are offering these merely to show the intent of the parties at the time. We are not offering them in the sense we are trying to use an offer to settle against them, but trying to show the intent of the parties, what the parties were doing at the time, so that we can justify actions of the plaintiff in endeavoring to settle this matter amicably.

The Court: I think anyone has a right to offer to settle anything any time any place, without its being used against him for any purpose. If you would admit offers of settlement you would never be able to try a lawsuit without prejudicing somebody."

respondent had from time to time made expenditures and investments (since 1937) by purchasing additional land, buildings and equipment. (R. 263; Findings 27 and 28.) Such proof disclosed that expansion of the diaphragm business had occurred prior to the 1937 letter of respondent's attorney (R. 150-152; 251-255),—that the 1937 purchase of the new building primarily pertained to other than diaphragm manufacture (R. 159; 160),—that respondent had never owned the plant within which radio loud-speaker production took place (R. 159),—and that expenditures shown were "expenses absorbed" by respondent. (R. 248.) Respondent never at any time made a long-term capital investment relating significantly to manufacture of the devices in suit. (R. 132-134; 248; 159-160.) With extension of manufacturing facilities resulting wholly from profits reaped by infringement, the District Court held that petitioner's delay was prejudicial. (R. 265; Conclusion F.)

When the case came on for hearing, by order of the District Court the issue of laches was separated for the purpose of trial from all other issues in the litigation,—with the Court retaining jurisdiction of remaining issues for future consideration. (R. 124.) After such separate trial, the Court ruled that petitioner's cause of action was barred by laches. (R. 265; 266.) It was held that petitioner was chargeable with knowledge of the spiders manufactured by respondent (R. 265; Conclusion E), so that actual knowledge of such infringement became immaterial. The Court decided that respondent had taken financial risks and had expanded its business during the period of petitioner's delay in bringing suit; and petitioner's civilian war-work was legally insufficient to constitute an excuse for such delay, in the light of possible obscuration of evidence. (R. 220-221.) Attorney's fees were awarded to respondent. (R. 266; 313.) On appeal to the United States Court of Appeals for Seventh Circuit, the judgment below was affirmed. (R. 370.)

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals erred:

1. In holding that the defense of laches is available where the patentee has had no actual knowledge of the infringement.

2. In holding that an infringer's plant expansion financed out of infringement profits supports an equitable defense of prejudicial change of position.

3. In holding that an infringer may invoke the defense of laches where, despite repeated notice of the patentee's claim, the infringer has neglected to pursue its remedy under the Federal Declaratory Judgment Act.

4. In holding that the defense of laches is available to an infringer where the patentee has repeatedly asserted his patent rights, sought compromise and delayed suit only because of the pressure of vital war-work.

5. In deciding (contrary to rulings of this Court) that a patentee is not entitled as of right to injunctive relief against future wrongs, in the absence of facts constituting equitable estoppel.

REASONS FOR GRANTING THE WRIT.

1. CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision of the Court of Appeals is in conflict with decisions of other Courts of Appeals, as follows:

(a) Knowledge of Infringement.

The Court of Appeals for the Seventh Circuit held that the defense of laches is available where the patentee has had no actual knowledge of the infringement, that ruling being in direct conflict with the decisions of the Second Circuit Court of Appeals in *Nachman Spring-Filled Corp. v. Kay Mfg. Corp.*, 78 F. 2d 653, 657 (CCA 2, 1935) and *Apex Electrical Mfg. Co. v. Landers, Frary & Clark*, 21 F. Supp. 241, 245 (D. C. Conn., 1937); affirmed, *per curiam*, 100 F. 2d 1009 (CCA 2, 1938). In the *Nachman Spring-Filled* case, the Second Circuit Court of Appeals stated:

> "It is said that because the plaintiff did not protest against the defendant's manufacturing the Nachman type casings uninterruptedly since the date of the separation, and because defendant has always inserted springs in their casings by means of filling tools coming under the tool patent, the plaintiff has been estopped. The first protest charging infringement was a letter of March 8, 1934, and the record shows that the plaintiff acted immediately upon knowledge of infringement. Under the circumstances, no claim of estoppel may be sustained."

Similarly, the District Court opinion in the *Apex Electrical* case contained the following holding:

> "There is no inequity whatever which prevents plaintiffs from enforcing their claim of infringement here, because there is no evidence whatever that the plaintiffs or their predecessors holding title to the patent in suit had any knowledge of the infringing acts of the defendant prior to the notice to the defendant on July 17, 1935."

In the present litigation, petitioner answered to respondent's interrogatory that his knowledge as to infringement of the spider patent was acquired in the first part of 1946 (R. 87-88; 129-130), with notice of infringement regarding that patent being given shortly thereafter on June 26, 1946. (R. 245.) Petitioner had never theretofore discussed the spider patent with respondent's representatives nor visited respondent's factory. (R. 335.) It has now been held by the Seventh Circuit Court of Appeals that an inventor is charged with notice of all industrial developments in the field within which the patent is granted.

(b) Expansion from Infringement Profits.

The Court of Appeals for the Seventh Circuit held that the infringer's plant expansion financed out of infringement profits supports an equitable defense of prejudicial change of position, that ruling being directly in conflict with the decision of the Fifth Circuit Court of Appeals in *Shaffer v. Rector Well Equipment Co.*, 155 F. 2d 344, 346-347 (CCA 5, 1946). In the *Shaffer* case, the Fifth Circuit Court of Appeals stated:

> "It does not seem that an infringer, whose business was 'constantly spreading out and growing' out of the infringed manufacture of an article, could acquire a legal right to continue to trespass upon the rights of another merely because the other had attempted to get him to desist by persuasion rather than by resorting to litigation. Moreover, the expansion of a business from the profits reaped by infringement is not a prejudicial change of conditions so as to authorize the defending infringer to invoke the defense of laches against a patent owner who has foreborne to hale him into court, meanwhile attempting to settle his claims amicably. Repeated wilful trespasses confer no right to continue them."

In the present litigation, the record establishes that any conceivable expansion of the infringer's radio division

resulted wholly from profits of infringement. (R. 24-26; 132-134; 158-160; 248-249.) No proof exists as to investment of new capital in the enterprise. The Seventh Circuit Court of Appeals has held mere expenditures from income may render infringement immune from attack.

See *Kester, Accounting Theory and Practice* (3rd Ed., 1930), Vol. I, pages 35-36.

(c) Declaratory Judgment Remedy.

The Court of Appeals for the Seventh Circuit held that an infringer may invoke the defense of laches where, despite repeated notice of the patentee's claim, the infringer has neglected to pursue its remedy under the Federal Declaratory Judgment Act, that ruling being in conflict with the decision of the Second Court of Appeals in *Clair v. Kastar, Inc.*, 148 F. 2d 644, 646 (CCA 2, 1945). In the *Clair* case, the Second Circuit Court of Appeals stated:

> "While a patentee is getting his patent sustained he is not bound to assert his claims to their fullest scope by suing every conceivable infringer. There is today some reciprocity of duty in this regard; if a manufacturer fears that he will be charged to infringe, he can always inquire of the patentee, and if the answer is unsatisfactory, he can bring an action for a declaratory judgment. The time has now passed when a patentee may sit by and refuse to show his hand. The defendant's putative uncertainties seem to us to have been of its own making."

The background for this conclusion of the Second Circuit Court of Appeals has been explained in *Borchard, Declaratory Judgments* (2nd Ed., 1941), 803-804:

> "As the law stood prior to 1934, when the Federal Declaratory Judgments Act was passed, the patentee was the only one in a position to initiate a suit, usually an action for damages and an accounting, with or without an injunction, against the alleged infringer or his dealers. * * *

> "* * * Instead * * * he now, by making threats and charges, exposes himself to an action at the hands of the alleged infringer for a declaratory judgment that the defendant's patent is invalid or, if valid, that the plaintiff is not infringing. By making charges, the patentee submits to an adjudication at the option of the alleged infringer."

See also *Salem Engineering Co. v. National Supply Co.*, 75 F. Supp. 993, 1000 (D. C., W. D. Pa., 1948).

In the present litigation, the Seventh Circuit Court of Appeals wholly rejected any such contention as indicated in the *Clair* case, concluding there was "no burden on anybody to pursue the remedy" of declaratory judgment.*

(d) War-Time Delay.

The Court of Appeals for the Seventh Circuit held that the defense of laches is available to an infringer where the patentee has repeatedly asserted his patent rights, sought compromise, and delayed suit only because of the pressure of vital war-work, that ruling being directly in conflict with decisions of the Sixth Circuit Court of Appeals in *Alliance Securities Co. v. DeVilbiss Mfg. Co.*, 41 F. 2d 668, 669-670 (CCA 6, 1930), and *Mills Novelty Co. v. Monarch Tool & Mfg. Co.*, 49 F. 2d 28, 29-30 (CCA 6, 1931). In the *Alliance Securities* case, the Sixth Circuit Court of Appeals stated:

> "It has been frequently held that the unusual years during and immediately after the great war constitute a period in which all reasonable postponement and suspension of litigation was a public duty."

Similarly in the *Mills Novelty* case, the same Court of Appeals stated:

> "Notice of infringement was given in 1916, promptly upon issue, and during the next four years the infringement continued and no action was taken. There is

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* Judge Learned Hand wrote for the Court in *Clair v. Kastar, Inc.* Judges Augustus N. Hand and Clark concurred.

> sufficient evidence that during most of this period the owners of the patents were financially unable to undertake the burden of patent litigation. Much of the period was also during the war, when such litigation was rightly discouraged. The patentees had given their notice, they had not withdrawn it, and during that period, the defendants continued their infringement at their peril."

There have likewise been District Court decisions to precisely the same effect. In *Harries v. Air King Products Co.*, 87 F. Supp. 572, 588-589 (D. C., E. D. N. Y., 1949), Judge Galston stated:

> "But the plaintiffs' failure to act in the period of time designated must be interpreted in the light of world events during that time. Harries was living in England during the period of World War II actively engaged in war effort. I am in whole hearted agreement with *Alliance Securities Co. v. DeVilbiss*, 6 Cir., 41 F. 2d 668, at pages 669-670,"—(quoting the reasoning set forth above).

In *Greyhound Corp. v. Rothman*, 84 F. Supp. 233, 240-241 (D. C. Md., 1949), the District Court also held that wartime activities constituted sufficient excuse for failure to sue during the period of hostilities.*

In the present litigation, petitioner testified (R. 179):

> "I was busy on war work and that was primarily the reason. I just didn't have the time to get into the thing, and it looked as if we would have to have quite a few witnesses, and to drag them out of their work at this time was almost impossible, I would say." (See also R. 190.)

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* Excusability of war delay as respects claimed laches was before the trial Court in *Davis Co. v. Baker-Cammack Hosiery Mills*, 86 F. Supp. 180, 186 (D. C., M. D. N. C., 1949); affirmed, 181 F. 2d 550, 568 (C. A. 4, 1950); cert. pending.

2. CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Court of Appeals is in probable conflict with applicable decisions of this Court such as *McLean v. Fleming,* 96 U. S. 245, 251 (1877) and *Menendez v. Holt,* 128 U. S. 514, 523-524 (1888). These authorities have settled the rule that even though one may delay over a long period actual institution of litigation, as a matter of right that party is entitled to injunctive relief against future wrongs in the absence of facts constituting an equitable estoppel. In *McLean v. Fleming,* this Court stated (96 U. S. 251):

> "Unreasonable delay in bringing a suit is always a serious objection to relief in equity; but cases arise in litigations of the kind before the court where the complainant may be entitled to an injunction to restrain the future use of a trade-mark, even when it becomes the duty of the court to deny the prayer of the bill of complaint for an account of past gains and profits."

So also in *Menendez v. Holt,* this Court stated (128 U. S. 514, 523-524):

> "Counsel in conclusion earnestly contends that whatever rights appellees may have had were lost by *laches,* and the desire is intimated that we should reconsider *McLean v. Fleming,* 96 U. S. 245, so far as it was therein stated that even though a complainant were guilty of such delay in seeking relief upon infringement as to preclude him from obtaining an account of gains and profits, yet, if he were otherwise so entitled, an injunction against future infringement might properly be awarded * * *
>
> "But there is nothing here in the nature of an estoppel, nothing which renders it inequitable to arrest at this stage any further invasion of complainants' rights * * * Delay in bringing suit there was, and such delay as to preclude recovery of damages for prior infringement; but there was neither conduct nor negligence which could be held to destroy the right to prevention of further injury."

See *Pomeroy, Equitable Remedies* (2nd Ed. 1919), Section 1445, page 3432.*

Obviously the question presented here is of importance in the enforcement of patent and trade-mark rights. The Court of Appeals has denied petitioner injunctive relief for protection of his patents, even though there has been constant determination to seek proper redress in the absence of amicable adjustment respecting infringements claimed. No element of equitable estoppel is present on the facts here nor has respondent ever in any way been misled as to petitioner's future course. Disposition of these issues is definitely in the public interest, for the protection of inventors will be served by clarification of the equitable doctrine of laches. If it is to become necessary for one who holds a patent to start litigation at once, even without excusable delay, such a principle of judicial administration ought to be passed upon by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LUTHER DAY,
CURTIS C. WILLIAMS, JR.,
JAMES F. SEXTON.

September 5, 1950.

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* Applying the above decisions of this Court, Judge Sanborn stated in *Ide v. Trorlicht, Dunckler & Renard Carpet Co.*, 115 Fed. 137, 148 (C. C. A. 8, 1902):

> "But delay, unaccompanied by such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action. It is no answer to an application for an injunction to restrain a defendant from committing waste by cutting trees upon the owner's land that, because the latter has taken no steps to prevent the wrongdoer from cutting one half of the trees, he has thereby acquired a right to cut the other half. Attorney General v. Eastlake, 11 Hare, 205, 228."

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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